

**Five Hospital Homebound Elderly Program and
General Service Employees Union Local 73,
SEIU, AFL-CIO, Petitioner. Case 13-RC-19186**

April 10, 1997

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

The National Labor Relations Board has considered a determinative challenge in an election held on October 27, 1995,¹ and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 22 for and 21 against the Petitioner, with 1 determinative challenged ballot.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.²

The Employer has excepted to the hearing officer's recommendation that the challenge to the ballot of Patricia Moscato be sustained. For the reasons set forth below, we find merit in this exception.

In April, Moscato was hired as a part-time home health care manager (registered nurse) to provide skilled nursing care, including infusion therapy, for patients at their homes.³ Between April and August, Moscato saw three patients—Sister Mary Chemlewski on April 18 and April 19, May 9, 12, 15, and 19; Jorge Prieto on May 31 and June 1; and James Sfarnus from May 28 until August 10.⁴ Similar to the Employer's other registered nurses, Moscato's duties included patient care, filling out activity logs,⁵ writing up nurse's notes which were required to be submitted to the Employer within 48 hours of a patient visit, discussing the patient's progress on the telephone with her supervisor and other health care personnel including physicians, and occasionally attending staff meetings.

The hearing officer found that Moscato was ineligible to vote because she did not work an average of 4 hours per week for the 13 weeks preceding the eligibility date in accordance with the *Davison-Paxon Co.*⁶

formula.⁷ During the relevant period Moscato made 34 visits to her patient, Sfarnus, and averaged 44 minutes per visit.⁸ In determining that Moscato was not eligible, the hearing officer counted only the time Moscato actually spent at Sfarnus' home and did not count the time that Moscato spent traveling to Sfarnus' home, completing paperwork and traveling to the Employer's office to submit it, and speaking with Sfarnus' physician and with her supervisor. The hearing officer found that these duties were incidental to her primary function of providing nursing services. The hearing officer further stated that while he would have counted the paperwork time, no additional time was attributed to that function because Moscato testified that she "almost always" performed that work at the patient's home. Accordingly, the hearing officer found that Moscato only averaged approximately 2 hours of work per week and thus did not meet the 4-hour eligibility requirement in accordance with the *Davison-Paxon* formula.

In its exceptions, the Employer argues that the hearing officer erred in only including the time Moscato spent actually visiting Sfarnus. The Employer contends that the hearing officer erred in finding that Moscato's other duties were merely incidental to her primary nursing function. The Employer further maintains that because of a misreading of Moscato's testimony, the hearing officer erroneously failed to attribute additional time for the completion of mandatory paperwork. The Employer argues that because Moscato actually testified that she did not complete Sfarnus' paperwork at his home, the hearing officer should have included the 30 to 60 minutes Moscato spent completing paperwork apart from the paperwork she filled out during the patient visits. The Employer also claims that Moscato's travel time to the Employer's office to submit required paperwork, and the time Moscato spent consulting with other health care personnel, should not have been excluded in determining her eligibility. We find merit in the Employer's contentions.

First, we agree with the Employer that the hearing officer erred in concluding that no additional time should be counted for the preparation of paperwork because that work was almost always completed at the patient's home. We find that the record does not support the finding that the paperwork for Sfarnus was almost always completed at his home. Moscato testified that although she tried to do the required paperwork at Sfarnus' home, she was unable to complete it during

¹ All dates are in 1995, unless stated otherwise.

² In the absence of exceptions, we adopt pro forma the hearing officer's finding that Patricia Moscato is not a supervisor within the meaning of Sec. 2(11) of the Act.

³ Moscato also worked as a full-time supervisor of Infusion Therapy for Ancilla Home Care until November 3 when she became a full-time employee of the Employer.

⁴ Moscato was paid on a fee-per-visit basis. Between August 11 and November 2, Moscato performed no services for the Employer and was not paid although she remained on the payroll.

⁵ The activity logs included the length of time of the visit, the number of miles driven to the patient's home, and the type of service provided to the patient.

⁶ 185 NLRB 21 (1970).

⁷ The hearing officer found that the calendar quarter immediately preceding the eligibility date, April 1 through June 30, was too far removed from the September 25 eligibility date. Relying on *Sisters of Mercy Health Corp.*, 298 NLRB 483, 484 (1990), the hearing officer instead used as the relevant period the 13 weeks immediately preceding September 25, i.e., June 26–August 10 (as noted above, Moscato did not work for the Employer between August 11 and September 25).

⁸ This amounts to a total of 24.9 hours.

that time.⁹ Moscato further testified that she spent at least 30 to 60 minutes completing mandatory paperwork away from Sfarnus' home.¹⁰ We find that the time spent by Moscato completing paperwork outside of the patient's home should properly be counted in determining Moscato's eligibility. Accordingly, we shall add 30 minutes of paperwork time for each of Moscato's 34 visits to Sfarnus.¹¹

Second, the record shows that Moscato was required to submit the paperwork to the Employer within 48 hours of a patient visit. Further, the record shows that at least every other day Moscato spent 45 minutes traveling to the Employer's facility to submit the paperwork. The hearing officer excluded this time in determining Moscato's eligibility because he found this duty to be incidental to her primary function of providing patient care and because he found it to be akin to commuting time which is not counted as worktime. The Employer argues that this duty was not incidentally performed by Moscato, but was an essential part of her job function. Further, the Employer maintains that, under the circumstances presented here, this cannot be considered to be commuting time because Moscato was required to make a special trip from her other job at Ancilla to the Employer's office every 48 hours, independent of her trips between her home and the patient's home.

We agree with the Employer that these extra required trips to the Employer's office to deliver mandatory paperwork were not merely incidental to Moscato's patient care responsibilities, but were an essential requirement of her job. We further find that under these particular circumstances, the time spent by Moscato on these trips to the Employer's office should not be excluded as commuting time. These trips were not made for the purpose of beginning or ending Moscato's workday, but were separate and independent trips made for the benefit of the Employer solely for the purpose of turning in mandatory paperwork. Thus, we find that these trips were made by Moscato to ful-

fill one of the requirements of her job and, as such, were an integral part of Moscato's work activities and were not akin to commuting. Accordingly, we believe it is appropriate to consider these trips as work time and shall include 45 minutes for half of the 34 visits to Sfarnus.¹²

Third, we agree with the Employer that the hearing officer erred in finding that the time Moscato spent consulting with other health care personnel, including her supervisor, was merely incidental to Moscato's primary job duties and should not be counted. We find that these duties, as well as attendance at staff meetings, are an essential part of Moscato's job and the time spent performing these duties should be counted in determining Moscato's eligibility.¹³ Although we find that this time is countable in determining an employee's eligibility, we find it unnecessary here to calculate the actual amounts of time spent on these functions because, as found below, Moscato would meet the requirements of the *Davison-Paxon* formula even without these amounts. Accordingly, we shall not add any additional time for these duties.

In sum, we find that during the 13 weeks prior to the eligibility date, Moscato worked a total of 54.65 hours,¹⁴ or an average of approximately 4.2 hours per week. As this average meets the *Davison-Paxon* formula, we conclude that Moscato was eligible to vote in the election. Accordingly, we overrule the challenge to her ballot.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 13 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Patricia Moscato, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

¹² This amounts to a total of 12.75 hours. We agree with the hearing officer that commuting time should not be counted, and accordingly we shall not count the driving time between Moscato's home and her patient's home.

¹³ Moscato testified that she spent about 5-10 minutes once or twice a week speaking with physicians. It is unclear how much time Moscato spent consulting with her supervisor. The hearing officer found that Moscato attended only two staff meetings from the time she began her employment until the election.

¹⁴ As noted above, the patient visits totaled 24.9 hours, the time spent completing the paperwork totaled 17 hours, and the travel time to submit the paperwork totaled 12.75 hours. These activities together total 54.65 hours.

⁹ Moscato testified as follows:

As much paperwork as I could finish in the home and if it was feasible for me, I would do. But my problem with Mr. Sarfonis [sic] is that I was working full-time. So, I really didn't have a lot of time to sit there and do the paperwork. I would do that at home.

¹⁰ Moscato testified that she spent 30-60 minutes "either each and every time" she saw Sfarnus, "or every other day."

¹¹ This amounts to an additional 17 hours.